

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSEPH JERMANO and DORY ANN
JERMANO, as Parents and Natural
Guardian of MIA JERMANO, a minor, and
In their own right, DORY ANN JERMANO,
and DOROTHY BERGE,

Plaintiffs,

v.

GRACO CHILDREN'S PRODUCTS INC.

Defendant.

Case No. 13-cv-10610

Hon. Matthew F. Leitman

Magistrate Judge Mona K. Majzoub

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RHODES, LLC

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Attorneys for Defendant

**DEFENDANT GRACO CHILDREN’S PRODUCTS INC.’S
MOTION FOR LEAVE TO FILE NOTICE OF NON-PARTY AT FAULT**

Defendant Graco Children’s Products Inc. (“Graco”) respectfully submits its Motion for Leave to File Notice of Non-Party at Fault and prays that this Court allow Graco to submit its Proposed Notice of Non-Party at Fault, pursuant to MCR 2.112(K)(3)(c), in the form of **Ex. A**.

**BRIEF IN SUPPORT OF
DEFENDANT GRACO CHILDREN'S PRODUCTS INC.'S
MOTION FOR LEAVE TO FILE NOTICE OF NON-PARTY AT FAULT**

Graco respectfully prays that this Court grant its Motion for Leave to File Notice of Non-Party at Fault.

1. This motion is brought pursuant to MCR 2.112(K)(3)(c), which allows a party to file a motion requesting leave to identify a non-party at fault upon leave of the court. To obtain leave of the court, the moving party should establish “[1] that the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier... [and 2] the notice does not result in unfair prejudice to the opposing party.” MCR 2.112(K)(3)(c).

2. Facts obtained for the first time at a deposition are sufficient to grant a defendant's motion for leave to identify a non-party at fault. *Quintal v. Von Maur Inc.*, No. 12-11521, 2012 WL 6000404, at *4 (E.D. Mich. Nov. 30, 2012) (attached as **Ex. B**) (“[I]t was not until after plaintiff's deposition that defendant learned that plaintiff sought to hold [plaintiff's] medical providers liable for a number of her injuries and/or death. Accordingly, the facts on which the late notice is based on could not have been known to defendant earlier through the exercise of reasonable diligence.”).

3. On August 21, 2014, Graco first learned through depositions that Andrew Thibodeau may have caused the accident that forms the basis of this lawsuit because Mr. Thibodeau (1) was potentially impaired by the use of both prescription and non-prescription narcotics; (2) sped; and (3) may have ignored a traffic light. On August 21, 2014, Graco took the deposition of Andrew Thibodeau, the driver of the Lincoln Mark VIII that impacted the Jermano's vehicle, as well as the depositions of three other occupants of the Lincoln Mark VIII. During Andrew Thibodeau's deposition, Graco first learned that Andrew Thibodeau may have been under the influence of a prescription narcotic, Darvocet, at the time of the accident. (A. Thibodeau Dep., Aug. 21, 2014, 11:3-11, attached as **Ex. C.**) Another occupant indicated that Andrew Thibodeau may have been under the influence of marijuana at the time of the accident. (H. Thibodeau Dep., Aug. 21, 2014, 27:6-17, attached as **Ex. D.**) Yet another occupant indicated that Andrew Thibodeau was speeding at the time of the accident and may have ignored a traffic light. (A. Watts Dep., Aug. 21, 2014, 15:12-19; 16:1-21, attached as **Ex. E.**)

4. Plaintiffs would not be prejudiced by this notice because discovery in this case is still ongoing and Plaintiffs participated in the above-referenced depositions through counsel. Discovery is still ongoing in this case, and Plaintiffs may conduct additional discovery related to Andrew Thibodeau's fault if they see

fit. (Amended Case Management Requirements and Scheduling Order, Jun. 17, 2014, attached as **Ex. F.**) At the above-referenced depositions, Plaintiffs were represented by counsel, who conducted follow up examination.

5. Graco has conferred with Plaintiffs' counsel regarding its Proposed Notice of Non-Party at Fault pursuant to Ed. Mich. L.R. 7.1(a), and Plaintiffs' counsel does not consent to this motion or Graco's Proposed Notice of Non-Party at Fault.

WHEREFORE, Graco respectfully prays that this Court grant its Motion for Leave to File Notice of Non-Party at Fault because it only recently learned of the above facts and because such notice would not prejudice Plaintiffs.

Dated: October 2, 2014

Respectfully submitted,

By: /s/ Heidi K. Oertle

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ATTORNEYS FOR DEFENDANT
GRACO CHILDREN'S PRODUCTS INC.

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on October 2, 2014, she caused the foregoing documents to be served on all counsel of record via the Court's ECF system.

/s/ Heidi Oertle

Heidi Oertle